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No. 80-2036

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOEL D. JOSEPH, PETITIONER

v.

HOWARD W. CANNON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Petitioner brought this action against respondents Howard W. Cannon, a United States Senator, and Chester B. Sobsey, his administrative assistant, under the *qui tam* provision of the False Claims Act, ch. 67, 12 Stat. 696, Rev. Stat. 3490-3494 (1873-1874), as amended.[1] Petitioner's

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[1] The civil provisions of the False Claims Act have been codified at 31 U.S.C. 231 *et seq.*, but because Title 31 has not been enacted into positive law and the codified version differs from the Revised Statutes, we cite to the latter. See *United States* v. *Bornstein*, 423 U.S. 303, 305 n.1 (1976). The *qui tam* provision, Rev. Stat. 3491 (see 31 U.S.C. 232), provides that a private party may maintain a suit if he first discloses to the Attorney General the information on which his claim is based; the United States then has 60 days in which to take over the suit if it wishes. Petitioner complied with this requirement and the United States declined to enter the suit (Pet. App. 29a).

principal allegation is that Senator Cannon authorized the payment of Sobsey's federal salary during a time when Sobsey was working "extensively and exclusively" on the Senator's 1976 reelection campaign (Pet. App. 2a).[2]

The United States District Court for the District of Columbia dismissed petitioner's complaint, holding that because the information on which it was based was already in the possession of the government, a *qui tam* action was barred by Rev. Stat. 3491 (see 31 U.S.C. 232(C)). The court of appeals rejected this basis for dismissing the complaint, but it affirmed on the ground that, because there was "a complete absence 'of judicially discoverable and manageable standards for resolving' the question whether Senators may use paid staff members in their campaign activities" (Pet. App. 12a, quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)), upholding petitioner's claim would require the court "to venture far beyond the limits of acceptable judicial action" (Pet. App. 10a). The court accordingly concluded that it was required to "decline to read the Act as proscribing the particular conduct alleged in [petitioner's] complaint" (*ibid.*).

The court of appeals first noted that at the time of Senator Cannon's 1976 campaign, no Senate rule restricted Senate aides' participation in political campaigns; indeed, the Senate had deliberately chosen *not* to impose such

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[2]Petitioner also alleged that "the Senator's staff performed personal services for him and his family while collecting their governmental salaries" (Pet. App. 2a). The district court dismissed this claim on the ground that petitioner had "failed to state with particularity the circumstances of the fraud alleged" (Pet. App. 30a), as required by Fed. R. Civ. P. 9(b). The court of appeals affirmed, noting that although petitioner had ample opportunity "to remedy the deficiencies of the original pleading[,] [h]e made no effort to do so" and that on appeal petitioner gave no indication of how he might make his claim more specific (Pet. App. 27a). Petitioner appears not to challenge this aspect of the court of appeals' ruling.

Senator Cooper, a member of the committee that drafted Rule XLIII, similarly stated that the "question on how many employees are used in a campaign is one we cannot deal with now. It seems to address itself to the judgment and the sense of propriety of each Senat[or]" (Pet. App. 15a-16a n.60, quoting 114 Cong. Rec. 6839 (1968)).

Moreover, the court of appeals said that it could find no statute or administrative ruling that defined the extent to which a member of a Senator's staff could perform political duties (Pet. App. 12a-13a). The court also discussed at length the Senate's efforts since 1977 to deal with the question of employees who engaged in political activities while on the Senate payroll (*id.* at 16a-21a), and noted that the committee studying the matter reported that " '[o]ther than the actual handling of campaign funds, the Senate has not imposed any restrictions on the participation of a member of a Senator's staff in that Senator's reelection campaign' " (*id.* at 21a, quoting S. Rep. No. 95-500, 95th Cong., 1st Sess. 2 (1977)). In 1977 the Senate again declined to adopt a proposal to limit staff members' participation in political campaigns (Pet. App. 16a-18a).

For these reasons, the court of appeals determined that it could find "no 'manageable standards' for a court to apply when viewing staff participation in a Senate reelection campaign" (Pet. App. 22a, quoting *Baker* v. *Carr*, *supra*, 369 U.S. at 217). The court concluded (Pet. App. 22a, 24a):

> [T]he interpretation of the False Claims Act suggested by [petitioner] would license the courts to monitor every action taken by a Senator and his aide in an effort to determine whether it is sufficiently "official" or too "political." * * * [W]e are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that Congress

> gave the courts a free hand to deal with so sensitive and controversial a problem, or invited them to assume the role of political overseer of the other branches of Government.

Therefore, the court held, petitioner had stated "no cause of action * * * under the [False Claims] Act" (*id.* at 24a).

2. The False Claims Act provides that it shall be unlawful to make a "false, fictitious, or fraudulent" claim against the United States.[3] See *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co.*, 131 F. 2d 545 (2d Cir. 1942), aff'd by an equally divided Court, 320 U.S. 711 (1943). If Sobsey's position were defined—by statute or perhaps by Senate rule or common understanding—in a way that excluded full-time participation in a political campaign, then respondents' claims for Sobsey's salary might be said to have implicitly represented that Sobsey was not working primarily on Senator Cannon's campaign, and petitioner's allegation might then state a *qui tam* cause of action under the False Claims Act. But petitioner has not established that Sobsey's position was defined in a way that precluded extensive campaign work. Consequently, even if petitioner's factual allegations are true, the claim for Sobsey's salary was not false or fraudulent.

As the court of appeals showed, the Senate, in drafting the rules that were in force in 1976, deliberately chose not to define the position in a way that excluded extensive campaign activities. The court of appeals also noted that the appropriations statutes under which Sobsey was paid provided simply for the " 'compensation of officers, employees,

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[3]The False Claims Act applies to false claims presented to Congress (see *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955)), and actions have been successfully brought against members of Congress under the Act. See *ibid.*; *United States* v. *Eilberg*, 507 F. Supp. 267 (E.D. Pa. 1980); *United States ex rel. Hollander* v. *Clay*, 420 F. Supp. 853 (D.D.C. 1976).

[and] clerks to Senators' " (Pet. App. 13a, quoting Legislative Branch Appropriation Act, 1976, Pub. L. No. 94-59, 89 Stat. 269, and Legislative Branch Appropriation Act, 1975, Pub. L. No. 93-371, 88 Stat. 424). Presumably aides whose salaries are paid from this appropriation are to be compensated only for services performed in connection with a Senator's official functions, and not for purely personal services to the Senator. See generally 31 U.S.C. 628; 52 Comp. Gen. 504 (1973); 50 Comp. Gen. 534, 536 (1971). But it is difficult to distinguish between participating in a Senator's campaign and helping him to perform such legitimate official functions as serving constituents, ascertaining their views, and gathering information from them or explaining the Senator's positions to them. See *United States* v. *Brewster*, 408 U.S. 501, 512 (1972); S. Rep. No. 95-500, 95th Cong., 1st Sess. 4 (1977) ("[A] staff member's Senate duties * * * necessarily encompass political and representational responsibilities, as well as legislative, administrative, or clerical ones, and are often performed during irregular and unconventional work hours.").

If some independent standards existed for making the distinction between official activities and campaign activities, it might be possible to define the duties of a Senator's aide in a way that barred him from collecting a salary for engaging in campaign activities. But in the absence of any such standards, we doubt that Congress intended the courts to construct such a definition in the course of interpreting the False Claims Act or the statutes governing aides' salaries. Indeed, the history of the Senate's treatment of this problem suggests that the Senate did not want an aide's role to be subject to such limitations, except to the extent they were imposed by the individual Senator.[4]

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[4]Petitioner asserts (Pet. 11-12) that the decision below conflicts with *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970). In that case the plaintiffs claimed that certain county

For these reasons, we believe that petitioner's complaint was properly dismissed, and we agree with much of the court of appeals' reasoning.[5] Especially in view of the

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and city officials violated the Constitution by "requir[ing] city and county employees, as a condition of holding their jobs * * * to furnish votes, campaign work, and money to elect candidates chosen by the regular [D]emocratic organization" (*id.* at 268). The Seventh Circuit rejected the argument that this claim presented a nonjusticiable political question (*id.* at 270-271).

Shakman is distinguishable from this case in at least two ways. First, it involved city and county officials, not the political activities of a coordinate branch of the federal government. See *Baker* v. *Carr*, *supra*, 369 U.S. at 217 (political question doctrine is "essentially a function of the separation of powers"). More important, although the decision of the court below was informed by principles concerning the proper role of federal courts, including principles underlying the political question doctrine, we believe that decision is properly understood not as a holding that petitioner's claim was nonjusticiable but as a determination that petitioner failed to state a claim under the False Claims Act. See generally Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976). So understood, the decision below of course does not conflict with a holding that a somewhat related constitutional claim was justiciable.

[5]See page 7, note 4, *supra*. The court of appeals' conclusion was that "under the facts alleged in * * * [petitioner's] complaint no cause of action has been made out under the Act" (Pet. App. 24a). To the extent that the court of appeals' opinion suggests that a prohibition against Senate aides' engaging in campaign activities could never be enforced by a court, we believe the court went beyond what was necessary to decide this case. We see no reason to conclude at this point that it is in principle impossible to distinguish between activities related to a political campaign and other, official legislative activities; it is enough that no such distinction was reflected in the definition of respondent Sobsey's position. The Court has drawn a somewhat comparable distinction in interpreting the Speech or Debate Clause. See *United States* v. *Brewster*, *supra*, 408 U.S. at 512:

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in

Senate's ongoing efforts to deal with the issue (see Pet. App. 21a), we see no reason for the Court to review the decision below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1982

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securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. * * * [T]hese * * * activities * * * are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause.